Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 257 and 258

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, and AMERICAN SOCIETY OF TRAVEL AGENTS,

Petitioners,

—against—

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE), *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 16, 1967

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Respondents, Aktiebolaget Svenska Amerika Linien (Swedish American Line), *et al.*, submit this brief in opposition to the separate petitions for a writ of certiorari filed by the Solicitor General on behalf of the Federal Maritime Commission (Commission) and the United States of America (Government) (No. 257) and by American Society of Travel Agents, Inc. (ASTA) (No. 258).

Jurisdiction

Assuming the petitions for a writ are timely with respect to the judgment of the Court of Appeals entered on January 19, 1967 (Govt. Pet. App. E), even though 28 U. S. C. 2350 invoked by petitioners does not authorize the time ex-

tensions granted herein, they are in no event timely with respect to the judgment of the Court of Appeals entered on June 10, 1965 (Appendix A hereto), which settled the issues review of which is now belatedly sought by indirection.

Question Presented

The only question presented by the last judgment below is whether the Commission's order was "arbitrary and capricious and not supported by substantial evidence on the record considered as a whole," as the Court of Appeals concluded (Govt. Pet. App. D, p. 132).

The case is an ordinary one of failure of proof. No conflict with decisions of this Court or of another court of appeals is involved; nor is any important question of federal law presented which should be settled by this Court.

Statement of the Case

Respondents, representing nearly all American and European steamship lines furnishing regular passenger service across the Atlantic, are members of either or both the Trans-Atlantic Passenger Steamship Conference (TAPSC) and the Atlantic Passenger Steamship Conference (APSC). These conferences are the successors of similar conferences in the transatlantic passenger steamship industry long antedating the enactment of the Shipping Act, 1916 (JA 137a-138a, 388a).* Steamship conferences have been defined as "voluntary associations of ocean common carriers formed so that the members may agree upon rates and cer-

* References are to pages of the Joint Appendix (JA) before the Court of Appeals, which has been filed with this Court.

tain other competitive practices." * Their purpose is the reduction of "the rigors of competition which otherwise would exist among the member lines." **

Traditionally the chief sales force for passenger bookings on vessels of the conference member lines has been a corps of qualified appointed travel agents throughout the United States and Canada and in Europe. The relationship between the member lines and their appointed agents, referred to as sub-agents, is a fiduciary one and the selection, supervision, rate of commission and other benefits given these agents have been historically regulated in the public interest by conference agreement.***

Substantial expense is borne by respondents in maintaining the conference system of selection, bonding and supervision of qualified agents, providing them with advertising and promotional materials and contributing to the cost of their own tour advertising, granting them and their families 75% reduced rate passage for personal travel, furnishing them various services such as informative manuals and bulletins on applicable laws, regulations, passport and visa requirements, and assistance from a con-

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* S. Rep. No. 860, 87th Cong., 1st Sess. 4 (1961).

** *Ibid.* Recognizing the need of our foreign trade for effective and stable shipping conferences, Section 15 of the Shipping Act, 1916, expressly exempts approved conference agreements from the operation of the antitrust laws. 39 Stat. 733, 46 U. S. C. 814.

*** See *Singer* v. *Trans-Atlantic Passenger Conference*, 1 U. S. S. B. B. 520, 523 (1936), pointing out:

> "The relation of a ticket agent to its principal is of a fiduciary nature. As large sums of money are handled by these agents, the lines should be permitted all possible latitude in their appointment and supervision in order to ensure proper protection to themselves and to the public. . . ."

ference auditor in setting up their record systems (JA 56a-58a, 224a, 382a).

Any water carrier operating or intending to operate a regular transatlantic passenger service may readily become a full conference member (JA 164a) and thus have access to the services of this corps of qualified agents, as may tramp or freighter steamships of limited passenger capacity by becoming associate members (JA 167a-168a, 382a).

By reason of the dependence of conference passenger lines upon their appointed agents as their principal sales force, and the importance of the agents' contractual allegiance as a cornerstone of conference stability, all passenger conference agreements, both before and after the Shipping Act, 1916, followed the principle of unanimous voting as regards the rate of commission payable to appointed agents and all prohibited such conference agents from representing non-conference steamship services without permission of the appointing lines.*

The conference agreements of TAPSC and APSC (and their predecessors), including such provisions regarding unanimous voting and representation of non-conference services, had been continuously approved by the Commission or predecessor agencies following the enactment of the Shipping Act, 1916, until the 1959 Commission investigation referred to in the petitions. At the conclusion of that investigation the Commission's Hearing Examiner

* House Committee on the Merchant Marine and Fisheries, *Steamship Agreements and Affiliations in the American, Foreign and Domestic Trade;* H. R. Doc. 805; 63rd Cong., 2nd Sess., 43, 46-47 (1914), the basic study leading to the Shipping Act, 1916, and commonly known as the "Alexander Report."

recommended certain modifications in TAPSC practices and procedures relating to the selection, appointment and supervision of travel agents appointed by respondents in the United States. He also felt constrained to disapprove the rule prohibiting conference agents from representing non-conference steamship services without approval of the appointing lines (the so-called "tieing rule")—not on the ground that it violated any Section 15 standard but because it was not shown to be necessary for conference purposes (JA 441a). However, he refused to disapprove the rule requiring unanimous agreement for changes in the commission rate payable to agents (the so-called "unanimity rule").

Upon the entire record of the investigation the Examiner's ultimate conclusion was as follows (JA 449a):

> "Insofar as they relate to travel agents, Agreement No. 7840 of APC and Agreement No. 120 of TAPC are not found, in principle, to be unjustly discriminatory or unfair as between the parties named in section 15 of the Act, to operate to the detriment of the commerce of the United States, to be contrary to the public interest, nor to be in violation of the Shipping Act, 1916, provided they are modified in accordance with this decision. The agreements therefore should not be disapproved or cancelled insofar as they relate to travel agents." *

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* The recommended modifications, except for the tieing rule prohibition, were accepted by respondents, resulting in a thoroughgoing revision and updating of the conference agreement provisions and regulations regarding travel agents, which have been filed with the Commission.

Specifically, the Examiner concluded that there was no proof in the record supporting the contentions of Commission hearing counsel and ASTA that the unanimity rule (a) had blocked or delayed conference action to increase commissions payable to agents, (b) had placed the member lines at a competitive disadvantage relative to the airlines, and (c) should be disapproved as detrimental to the commerce of the United States (JA 441a-444a).

This failure of proof was acknowledged by the Commission itself, although it reversed the Examiner as to the unanimity rule and held that it should be disapproved. It agreed with him (Govt. Pet. App. A, p. 43):

> ". . . that the record in this proceeding does not support a finding that the level of commissions is unreasonably low."

As the Commission further noted (*ibid.*, p. 44):

> "The record does show a decrease in the relative number of steamship bookings in relation to total bookings. But it is not established that the level of commissions is the primary reason for this. The problem of diversion of passengers from sea to air does exist, and it is a problem which the lines have attempted to solve by increasing the commission level. But it is undisputed that the enormous growth in air travel is largely attributable to factors unrelated to the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States.
>
> "Exhibit 106, the only one which ASTA presses in its brief which it claims is not covered by the evidence

introduced by hearing counsel, merely shows the rapid expansion of the airlines. It does not show that the agents are being forced out of business or losing money through the sale of sea bookings."

The Commission concluded (*ibid.*, p. 44):

"We do not imply that we feel the present commission levels are necessarily proper. We hold only that on this record there is not a sufficient showing for us to declare that such levels are detrimental to the commerce of the United States or otherwise unlawful under section 15."

The steamship rate of commission (or "level" as the Commission called it) is 7%, the same rate paid by the international air carriers. The operation of the unanimity rule must be determined by its results. Although the Commission disapproved the rule by vote of three to two, in light of the Commission's conclusion as to the levels of commission and its own appraisal of the record in other respects, it is hardly surprising that five judges of the Court of Appeals, comprising the two different panels which reviewed that record, unanimously agreed that disapproval of the rule was not supported by substantial evidence.

Commission disapproval of the tieing rule was supported by no evidence at all. No non-conference carrier appeared in the proceeding as complainant, intervenor or witness, although the proceedings were widely publicized. No travel agent produced evidence of any loss of business by reason of the rule. Mistakenly viewing the tieing rule as a "tieing arrangement" (which it is not), the Commission majority, two members again dissenting, condemned the rule virtu-

ally *per se* and held that "exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered" (Govt. Pet., App. A, p. 47).

The lower court's first judgment and opinion herein dated June 10, 1965 (Appendix A hereto; Govt. Pet., App. B, pp. 74, 76-77), correctly instructed the Commission concerning its statutory duty to find *"as a fact* that the agreement operates in one of the four ways set out in the section by Congress" [emphasis supplied], pointing out that the Commission must also consider antitrust principles in determining whether Shipping Act standards have been met and that the "prohibitions of the antitrust laws are not to be invaded 'any more than is necessary to serve the purposes' of the Shipping Act", citing its own decision in *Isbrandtsen Co.* v. *United States,* 93 U. S. App. D. C. 293, 299, 211 F. 2d 51, 57, *cert. denied sub nom. Japan-Atlantic & Gulf Conference* v. *United States,* 347 U. S. 990 (1954) (*ibid.,* p. 77).*

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* Congressional recognition of the need and value of effective steamship conferences was re-emphasized in Public Law 87-346, 75 Stat. 762 (1961), 46 U. S. C. §813a, amending Section 15 of the Act. As stated in the Senate Report recommending passage of that Law (S. Rep. No. 860, 87th Cong., 1st Sess. 4 (1961)):

> "For many years all of the maritime nations of the world, including the United States, have realized that the inevitable monopolistic and discriminatory nature of rate-war competition among the ocean common carriers serving their foreign commerce, justified the formation of conferences so that the carriers may limit or regulate competition between or among themselves."

The Senate Report also quoted the following comments from the House Report on the bill (H. R. Rep. No. 498, 87th Cong., 1st Sess.) (at pp. 12, 13):

> "The Department of Justice testimony on the legislation was generally unfavorable. While its position is consistent with the antitrust policy of the United States, it fails to take into

The court also clearly set forth the inadequacy of the facts cited by the Commission as reasons for disapproving the two rules in question. It then held (351 F. 2d 756, 760, 761-2):

> "We must remand the order disapproving the unanimity rule to the Commission for reconsideration, with directions either to make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or, if this cannot be done, to vacate that ultimate finding and approve the contract in this respect."
>
> • • • • •
>
> "... we remand [the Commission's order disapproving the tieing rule] for the purpose of reconsideration, with directions that either an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U. S. C. §814."

The Commission majority, if it thought the court's legal instructions were unclear, made no request for clarification. See, e.g., *Federal Power Comm.* v. *Idaho Power Co.*, 344

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account the peculiar nature of the particular business involved • • •.

• • • • •

"The hearings of the committee have made it quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce. Your committee has concluded that any attempt to effect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American-flag merchant marine."

U. S. 17, 19-20 (1953). Nor did it exercise its right to seek review in this Court. *Seaboard Air Line Railroad Co.* v. *Interstate Commerce Commission,* 382 U. S. 154, 155-156 (1965). Instead—although in obvious disagreement with the court*—the Commission simply rewrote its report and issued a new order of disapproval, two members again dissenting (Govt. Pet., App. C, pp. 78 *et seq.*, p. 128). No attempt was made to find any adequate supporting facts as directed by the court.**

Having discussed the law and inadequacy of supporting facts in its prior opinion, the Court of Appeals properly confined its second review to the record as represented by the Commission. Finding that the Commission had not called its attention to any new substantial evidence to support the disapprovals, the court was clearly warranted in concluding "that the Commission's decision is arbitrary and capricious and not supported by substantial evidence on the record as a whole" (Govt. Pet., App. D, p. 132). Thus no question other than sufficiency of evidence is presented in this case.

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* As the majority report said (Govt. Pet., App. C, p. 86):

"... nor do we read the opinion as precluding us from expanding and clarifying our perhaps too brief discussion of the law, nor even from disagreeing with the Court where the clear intent of Congress and our own experience and best judgment dictate."

** Annexed hereto as Appendix B is the "Comparative Table of Supporting Findings of Fact" incorporated as Appendix A in respondents' brief in the Court of Appeals, which illustrated how completely the Commission majority ignored the court's judgment remanding the case.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals correctly stated and applied the controlling law.

The court below did not reject "a method of accommodation of antitrust and regulatory principles" (Govt. Pet., p. 9) or rule that "antitrust principles are not to be considered in determining what is in the public interest" (ASTA Pet. p. 11). As ASTA noted in its brief below (p. 20), "The Court instructed the Commission that it must not 'completely separate itself from antitrust principles' in making its findings . . .". ASTA there stated that the court's first decision was "susceptible of only one meaning: the regulatory agency, after weighing both 'necessity' and antitrust principles must make a finding *in terms of the statutory standards* . . ." (p. 21; emphasis in original). The court directed the Commission to make adequate supporting findings considering both the antitrust laws and the Shipping Act. As we have pointed out, the court specifically referred to its earlier holding in *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 57, *cert. den. sub nom. Japan-Atlantic Gulf Conferences* v. *United States,* 347 U. S. 990 (1954) in this connection.

The ruling below was entirely in accord with holdings of this Court that the antitrust laws may not be ignored by an administrative agency whose approval can exempt parties from their consequences.* It also followed this Court's admonition that the necessity of reconciling the

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* Cf. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 216-220 (1966).

antitrust laws and another statute does not mean that only the antitrust laws should be considered. See *Seaboard Air Line Railroad Co.* v. *Interstate Commerce Commission,* 382 U. S. 154 (1965).* *Minneapolis & St. Louis Railway Co.* v. *United States,* 361 U. S. 173, 187 (1960).**

Applying these principles, the court below properly directed the Commission on remand to come up with adequately supported findings of fact which rationally led to ultimate conclusions of violation of the Shipping Act, or, if unable to make such finding, to approve the agreements. This the Commission chose not to do, preferring instead to rely on the same considerations and conclusions the court had previously rejected as inadequate (see Appendix B hereto). Having given the Commission another chance to prove its case with the benefit of the court's opinion, the court was not required to grant still another. See, e.g., *National Labor Relations Board* v. *Brown,* 319 F. 2d 7 (10 Cir. 1963), affd. 380 U. S. 278 (1965); *National Labor Relations Board* v. *Majestic Weaving Co.,* 355 F. 2d 854, 862 (2 Cir. 1966).

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* In *Seaboard,* this Court reversed a District Court decision remanding a proceeding to the Commission because the Commission had not determined whether the merger violated section 7 of the Clayton Act. The Court held that "it matters not that the merger might otherwise violate the antitrust laws" (382 U. S. 156-7). The critical question is whether "the merger would be consistent with the public interest despite the foreseeable injury to competition" (382 U. S. 156)..

** In *Minneapolis & St. Louis Railway,* this Court rejected the view that the Commission could authorize only those acquisitions which would not offend the antitrust laws.

Denver and Rio Grande Western Railroad Co. v. *United States,* 87 S. Ct. 1754 (1967), cited by ASTA, p. 11, stands for the same principle.

II.

No question requiring review is presented.

A. *The Sufficiency of Evidence Is Not a Question for Review.*

This Court has continually held that

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Commission* v. *American Tobacco Co.*, 274 U. S. 543, 544." *

Thus "Congress charged the Court of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions" of an administrative agency. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 409-410 (1952). And more recently in *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401 (1958), this Court held that it will "do no more

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* *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503 (1951).

on the issue of insubstantiality than decide that the Court of Appeals has made a 'fair assessment of the record.'" In that case this Court noted that its conclusion was "strengthened by the fact that the finding made by the Court of Appeals accords with that of the trial examiner [as it does with respect to the unanimity rule here], two dissenting members of the Commission [as here] and another panel of the Court of Appeals [as here] when the case was first before that court in 1949." (355 U. S. 401)*

B. *ASTA's Independent Legal Ground Is Not Worthy of Review.*

Throughout these proceedings ASTA contended that there is "undisputed evidence in the record of relationships between respondents and their principal competitors, the international airlines, the existence of which renders the unanimity rule inherently illegal" (ASTA Pet., p. 21). This is urged here as an independent question for review (ASTA Pet., p. 3, Question 3).

There is no probative evidence or any other basis to support such a claim. The examiner dismissed ASTA's alleged "undisputed evidence" as follows (JA 427a):

> "As stated in the reply brief of Hearing Counsel, the purported evidence upon which ASTA asserts that there was concerted action between APC and the international airlines or between APC and other steamship conferences is remote and speculative and lacks proba-

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* *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607 (1966), cited only by ASTA, is inapplicable here since there the court of appeals had set aside an agency order because it "ignores . . . the substantial weight of the evidence" (383 U. S. 618). Here the court of appeals did not weigh conflicting evidence; it found there was no substantial evidence supporting the Commission's order.

tive weight. For these reasons the proposed finding on this issue cannot be adopted and these questions need not be discussed further in the Discussions and Conclusions section of this decision."

The Commission and the court below did not deem ASTA's contention worthy of any comment. The administrative order not having been based on such a ground, it cannot be decided on such a basis now. *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 442-444 (1965); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168-169 (1962); *American Trucking Association* v. *United States*, 364 U. S. 1, 13-14 (1960).*

III.

The present petitions are an untimely attempt to seek review of matters decided in 1965.

Petitioners challenge the judgment below essentially on the ground that the court improperly directed the Commission to apply Shipping Act standards to the exclusion of the antitrust laws. As we have shown in Part I, the court made no such direction but, on the contrary, directed the Commission to apply both Shipping Act and antitrust standards. In addition, the court's instructions so complained of were embodied in its first judgment of June 10, 1965 (Appendix A hereto) which petitioners did not challenge.

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* Nor is any question for review urged by either petitioner on the basis of the Government's suggestion that the lower court's reversal of the Commission's decision without further remand was improper (Govt. Pet., p. 15, n. 6). The cases cited by the Government (Govt. Pet., p. 15, n. 6) involved the first decision of the administrative agency and are of no relevance here.

The second judgment—the only one ostensibly sought to be reviewed now—considered only whether there was "sufficient basis in supporting facts or evidence of record" to constitute an "adequate response to our mandate to eliminate the doubts and problems which we pointed out in our prior opinion" (372 F. 2d at 934). The court did not reexamine or even restate "the governing case law," noting that that law was "described in detail in our earlier opinion in this case" (372 F. 2d at 933). The Government itself recognizes that the court's "first opinion intimated disagreement merely with the legal standards applied by the agency and its second found fault only with the agency's failure to take evidence" (Govt. Pet., pp. 14-15).*

Title 28 prescribes that a writ of certiorari shall be "applied for within ninety days after the entry of such judgment or decree." Petitioners' failure to challenge the first judgment of the Court of Appeals until two years after its entry renders untimely their present attempt to do so indirectly by raising now the legal questions then decided.

This Court has on many occasions reminded parties that failure to apply for a writ of certiorari within the time limits prescribed by Title 28 deprives this Court of jurisdiction to grant the writ even if the petition raises important legal questions. *Green* v. *Bott*, 344 U. S. 900 (1952); *Delphi Frosted Foods Corp.* v. *Illinois Central Railroad Co.*, 342 U. S. 833 (1951); *Boyer* v. *Garrett*, 340 U. S. 912, 913 (1951); *United States* v. *Watkins*, 337 U. S. 942 (1949).

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* Actually, the first decision set aside the legal standards applied by the Commission *and* determined that the findings of the Commission based on the existing record would not support disapproval under the statutory standards. Respondents fully agree with the Government that the second decision was concerned only with the evidence or lack of evidence justifying disapproval.

"Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered, should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211-212 (1952) (footnotes omitted). This principle was recently affirmed in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 378 (1966).

A ruling "fundamental to the further conduct of the case" should be reviewed by this Court before remand. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945). If petitioners were dissatisfied with the legal standards announced in the first decision, they could have promptly petitioned for such review. As this Court pointed out in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 378:

> "After a court of appeals has set aside an order of the Commission on a point of law, the Commission may seek certiorari if it disagrees with the court's legal conclusion." *

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* See also *Seaboard Air Line Railroad Co.* v. *Interstate Commerce Commission*, 382 U. S. 154 (1965), reversing a District Court decision which remanded the proceeding for further hearings, and affirming the Commission's position; *Lawlor* v. *National Screen Service Corp.*, 352 U. S. 992 (1957), *per curiam* granting certiorari, vacating judgment and remanding for trial; *Bee Machine Co.* v. *Freeman*, 131 F.2d 190, 193 (1 Cir. 1942), aff'd *sub nom. Freeman* v. *Bee Machine Co.*, 319 U. S. 448 (1943).

To allow petitioners to raise now objections to legal standards finally decided by the Court of Appeals in its first decision entered over two years ago "would be promoting the 'sporting theory of justice' at the potential cost of substantial expenditures of agency time." *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 31 (1961). Certainly counsel should not be encouraged to withhold an appeal to this Court in order to have two more chances below—a second chance in the administrative agency and a second chance in the Court of Appeals. And he should not, by taking appeal from the second judgment in the same case, be permitted to reopen a question finally decided long before. "An aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly." *Rooker* v. *Fidelity Trust Co.,* 263 U. S. 413, 416 (1923); see also *Brown* v. *Alton Water Co.,* 222 U. S. 325, 331 (1912).

CONCLUSION

No erroneous statement or application of law is shown by the petitions, nor any conflict with decisions of this Court or other courts of appeals. The Commission's order was properly reversed for complete failure of proof. The petitions for a writ of certiorari accordingly should be denied.

Dated: New York, N. Y.
August 16, 1967.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18554 September Term, 1964.

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH-AMERICAN LINE), *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents,

AMERICAN SOCIETY OF TRAVEL AGENTS, INC. ("ASTA"),

Intervenor.

On Petition for Review of a Final Order of the Federal Maritime Commission.

Before: Edgerton, Senior Circuit Judge, and Washington and Danaher, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that this case is remanded to the Federal Maritime Commission for reconsideration and with directions for further proceedings consistent with the opinion of this court.

Per Circuit Judge Washington.

Dated: June 10, 1965.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

FILED JUN 10 1965
/s/ NATHAN J PAULSON
CLERK

APPENDIX B

Comparative Table of Supporting Findings of Fact*

Report on Remand		Original Report	
Page		Page	
3–4 (SJA 7a–8a)	"The minutes of March 8, 1950, show that lack of unanimity prevented the A. C. Subcommittee from recommending an increase in commissions. The minutes of March 9, 1950, demonstrate that again lack of unanimity prevented a recommendation to increase commissions even though 'all lines expressed a willingness in principle to an increase in agency commission' and 'the majority of the Lines . . . were prepared to increase the commission to 7½ percent all classes, all seasons.' A year later, on March 1, 1951, when commissions	13 (JA 467a)	"The conference records show that from about October 1950, all lines have shown a willingness in principle at least to increase the level of agency commissions. However, in 1950 and 1951 subcommittees of the APC were unable, because of the conference's Unanimity Rule, to recommend a proposed increase in commissions, although the majority was prepared to increase the commission from 6 percent to 7½ percent on 'all classes, all seasons.' The 1951 subcommittee stated that 'while there was a strong majority in favor of ap-

* No attempt has been made to include in this Table the Commission's conclusions and ultimate findings, which are discussed in the argument portion of this brief. Nor is any attempt made in this Table to assess the accuracy, materiality or relevance of the various findings set forth.

Page	Report on Remand	Page	Original Report
	were finally increased to 7½ percent, the increase excluded, again against the views of the majority, sales made in the so-called high or summer season. On these sales the 6 percent commission remained in effect.		plying a 7½ percent commission to all classes throughout the year, it was not possible to reach unanimous agreement,' and 'it was, therefore, suggested that the matter be deferred for consideration at the Statutory Meeting in March 1952.' The subcommittee did not have the power to take final action, but its function was to recommend action to the principals.
	"In October of 1951, a majority of the lines again attempted to increase the commission level, but 'it was not possible to reach unanimous agreement,' and again the failure to increase commissions was in the face of 'a strong majority in favour of applying 7½ percent commission to all classes through the year.' Lack of unanimity precluded any recommendation by the Committee to the principals on commission increases and the matter was 'deferred for consideration at the Statutory Meeting in March 1952.' At the March 1952 meeting the principals deferred the mat-		"In 1951 the conference increased the commission to 7½ percent, except on passage booked during the high-volume summer season where a 6 percent commission remained in effect. Proposals to increase commission were taken up and action was deferred at meetings in 1952 and 1953."

Report on Remand		Original Report	
Page		Page	
	ter of agents' commissions for consideration in June of that year by the A. C. Subcommittee, but in June the Subcommittee deferred it again for consideration at the conference meeting to be held in October 1952."		
4 (SJA 8a)	"In October, when the Subcommittee finally took up the matter of commission levels, it was again unable to make a recommendation to the principals because 'unanimity could not be reached on a proposal to extend the off-season basis to bookings for seasonal sailings.'	13 (JA 467a–468a)	"A 1952 subcommittee noted that 'unanimity could not be reached on a proposal to extend the off-season commission basis (7½%) to bookings for seasonal sailings.' The question was taken up again in 1956, when the present commission of 7 percent on all bookings was established."
	"The record sheds no light on any further conference action on the level of commissions until a 7 percent year-round commission was set at a special meeting in May 1956."		

Report on Remand		Original Report	
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4–5 (SJA 8a)	"Prior to this the matter had been discussed at a regular February-March meeting in 1956, but apparently no minute was kept on this meeting and none was filed with the Federal Maritime Board. However, the records of United States Lines, a member of the conference, reveal that at this meeting one of the lines exercised its veto power under the unanimity rule to prevent the conference from at once putting into effect 'an immediate adjustment in commission to 7% all year.'"		
5 (SJA 9a)	"But as we pointed out in our previous opinion in this proceeding, the effective level of commission for sea passage is less because the many unique arrangements which must be made when booking sea passage consume three to four times as much of the agent's time as is spent booking air travel."	20 (JA 477a)	"Time is money and the fact that the travel agent is able to sell more air than sea bookings in a given time period means, as ASTA correctly contends, that the effective commission rate of the steamship lines is lower than that of the airlines."
5 (SJA 9a)	"Many potential travelers (the record shows somewhere between 15 and 60 percent) come to travel agencies		

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	undecided as to whether to go by air or sea. The travel agent is, of course, in a position to influence such a traveler's decision."		
6 (SJA 10a)	". . . the record reveals a 'definite tendency' on the part of agents to push air over sea travel in such cases."	20 (JA 477a)	"The record clearly shows that agents tend to push air travel rather than sea travel, mainly because it takes considerably longer to handle the details of sea travel."
		14 (JA 469a)	"It takes approximately three or four times as must of an agent's time to sell sea as compared with air space, and several years of experience are required to produce a really competent steamship passage salesman. Because of this, appointed agents tend to push air rather than sea travel."
7 (SJA 12a)	"The record contains the admission by respondents that the tieing rule is intended to eliminate nonconference competition. . . . and agents have lost some prospective bookings because the rule prevented them from selling nonconference passage desired by the traveling public."		

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7 (SJA 11a)	"Since May of 1956 the agents have actively sought increases in the general level of commissions. They were told by the representatives of the conference members that the difficulty in securing unanimity of the membership prevented any increase in commissions."	13 (JA 468a)	"Since that time [1956], representatives of travel agents have sought increases in the commission levels but have been told that commission levels have not been raised since 1956 because the APC has had difficulty in achieving unanimity."
7 (SJA 11a)	"The conference is headquartered in New York and its membership comprises all of the lines operating regular passenger vessels in the trans-Atlantic trade and some lines operating freighters which can accommodate up to 12 passengers. These lines carry about 99 percent of all of the passengers traveling by sea between the United States and Europe. The remainder of the passenger traffic is handled by nonconference lines operating freighters which can carry a	10 (JA 463a)	"All passenger lines operating in the trans-Atlantic trade are members of TAPC. TAPC members carry 99 percent of the passengers moving by water in this trade. The only lines affected by the rule prohibiting sale of tickets via nonconference lines are those freighter services which carry a limited number of passengers on their cargo vessels. Such carriers, like the TAPC lines, must rely on travel agents for the sale of ocean transportation."

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	limited number of passengers. Like the conference lines, they must rely upon the travel agents for passenger bookings."		
15 (SJA 23a)	"The recognition by the member lines of the diversion from sea to air caused by the lower rate of commission on sea bookings has long led the majority of the lines to attempt to solve the diversion problem by trying to increase the levels of commission paid to their travel agents."	21 (JA 477a)	"The record contains some evidence of instances in which the diversion from sea to air passage has taken place against the best interest of the prospective passengers. However, this evidence related solely to the activities of agents who were not appointed by the conference lines. While it cannot be said these agents owed any duty to those lines, the fact remains that the diversion was not in the interests of the conference lines themselves. They have realized this and have attempted to solve the diversion problem by proposals to increase the level of agents' commissions."

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15–16 (SJA 23a–24a)	"The 'lack of unanimity' has on several occasions prevented the conference's subcommittee, which has the initial responsibility for commissions, from even reporting the positions of the member lines to the principals, respondents' assertions to the contrary notwithstanding."	20 (JA 476a)	"The record, moreover, affirmatively shows that a lack of unanimity on several occasions prevented the subcommittee from even reporting the positions of the member lines to the principals."
16 (SJA 24a)	"While it may be true as an abstract proposition that any matter could be placed on the agenda by a member line, and that the matter of commissions was held 'always in mind' by the principals, the facts remain that there is no instance in the record of action taken by the principals without strong concurrence by the subcommittee and that the present agents' commission is below the level advocated by a majority of the conference lines as long ago as March 1950. . . . Moreover, it is of no sig-	20 (JA 476a)	"The determinations of the subcommittee may not have been of the kind dictating final action, but they are apparently conditions precedent to any conference action with respect to the level of commissions. Although it is true that the principals on occasion took actions other than those recommended by the subcommittee, these appear to have been in the nature of a watering down of actions favored by at least a majority of the lines. There is no indication from the record that the principals

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In the

Supreme Court of the United States

October Term, 1967

Nos. 257 and 258

Federal Maritime Commission and United States of America, and American Society of Travel Agents, Inc.,

Petitioners,

—v.—

Aktiebolaget Svenska Amerika Linien (Swedish American Line), *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

Opinions Below

The opinion of the court of appeals (App. 651a) is reported at 125 U. S. App. D. C. 359, 372 F. 2d 932. An earlier opinion of the court of appeals (App. 517a) is reported at 122 U. S. App. D. C. 59, 351 F. 2d 756. The report of the Federal Maritime Commission on remand (App. 531a) is not yet officially reported, but may be

found at 7 Pike & Fischer S. R. R. 457. The Commission's first report (App. 451a) is reported at 7 F. M. C. 737.

Jurisdiction

The judgment of the court of appeals, reversing and vacating the order entered by the Federal Maritime Commission on remand, was entered on January 19, 1967. The time for filing petitions for writs of certiorari was extended to May 19, 1967, and further extended to June 18, 1967, by Orders of this Court dated April 18, 1967, and May 24, 1967, respectively. Petitions for writs of certiorari were filed on June 16, 1967, and were granted on October 9, 1967 (36 U. S. L. W. 3128). The jurisdiction of this Court rests on 28 U. S. C. §1254(1) and 28 U. S. C. §2350.

Questions Presented

1. Whether the Federal Maritime Commission's disapproval, as contrary to the public interest, of provisions of conference agreements which (a) require unanimous agreement of twenty-five member lines to change the ceiling on commissions paid to travel agents, and (b) prohibit agents from selling passage on non-conference vessels should have been affirmed by the court below on the basis of the Commission's finding that such provisions invade the prohibitions of the antitrust laws more than is necessary to further any valid purpose of the Shipping Act.

2. Whether the court below, in disregard of accepted standards of judicial review, improperly substituted its judgment for that of the Commission which had found such provisions to be detrimental to commerce, contrary to

the public interest and unfair or discriminatory as between carriers.

3. Whether the court below should have affirmed the Commission's disapproval of such provisions on an independent legal ground (the existence of interlocking directorates between certain respondents and their major competitors) which the court was competent to formulate.

Statute Involved

Section 15 of the Shipping Act, 1916, 46 U. S. C. §814, provides, in pertinent part:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations."

* * * * *

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

Statement of the Case

This case arises out of the reversal by the court below of the Federal Maritime Commission's disapproval of the unanimous voting and tieing rules of steamship conferences involved in the transatlantic passenger trade. The issue is whether those conferences may adopt rules which have been found to further no Shipping Act purpose or policy but which serve to freeze commissions paid to independent travel agents and restrict representation by them to conference lines only. Specifically, should the twenty-five members of the conferences be permitted to agree (a) never to change the ceiling on commissions paid

to agents unless agreement by *all* lines to such change can be secured and (b) to boycott any agent found to have sold passage on a non-conference vessel?

Petitioner American Society of Travel Agents, Inc. ("ASTA"), is a trade association whose members are independent travel agents ("agents") in the United States. Among other things, agents advise the public on travel matters and promote and sell various forms of transportation, including air, rail and ocean. Agents make no charge to the public for their services but receive commissions from carriers on consummated bookings. In 1960 agents booked 80% of all transatlantic ocean passage (App. 562a). The transatlantic ocean carriers consider agents to be their "principal sales force" (App. 456a).

Respondents are the twenty-five transatlantic ocean carriers who are members of either or both the Atlantic Passenger Steamship Conference ("APC") and the Trans-Atlantic Passenger Steamship Conference ("TAPC"). They carry 99% of the transatlantic passenger steamship trade (App. 562a) and act collectively with respect to agents through the APC as to the ceiling on commissions paid to agents, and the TAPC, the agency regulating "arm of APC" (App. 417a), on all other matters.

On October 22, 1958, ASTA filed a complaint concerning certain conference practices with the then Federal Maritime Board, a predecessor of the Commission.[1] On November 2, 1959, the Commission commenced the first investigation ever held of the operations of steamship conferences as they affect travel agents (App. 2a, 532a).

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[1] As used herein, "Commission" refers to the present Federal Maritime Commission and to its predecessor agencies.

The investigation was conducted under the Shipping Act, Section 15 of which requires respondents to file with the Commission " * * * a true copy, or, if oral, a true and complete memorandum * * * " of all agreements, modifications or cancellations of agreements among themselves which, broadly speaking, affect competition or commerce (46 U. S. C. §814):

> "The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter and shall approve all other agreements, modifications or cancellations."

Agreements approved under Section 15 are excepted from the antitrust laws.

A. *The Initial Decision and First Commission Report.*

Hearings were held in New York from May 16 to June 7, 1961, at which 26 witnesses testified and 141 exhibits were offered.[2] The evidence disclosed that respondents had established through the TAPC an elaborate system to control the transatlantic steamship business of agents and, *inter alia*, had arbitrarily and unfairly dealt with such matters as appointment and retention of agents, transfer and sale of agencies, and changes of officers and locations;

[2] The transcript totals 2,618 pages; the exhibits comprise more than 1,700 pages.

had misused voting procedures; and had imposed fines and penalties without due process of law .(App. 470-75a).

Immediately prior to, during and after the hearings, respondents undertook to correct some of the more patently unfair aspects of their "private government".[3] The Initial Decision of January 28, 1963 ordered further basic reforms (App. 402-50a).

A very substantial portion of the record was devoted to the procedures by which the APC fixes agents' commissions. The voting rule contained in APC Agreement No. 7840, provides:

> "Rates of Commission and Handling Fees which Member Lines may pay to their General Agents or Sub-Agents shall be established by unanimous agreement of the Member Lines." (App. 212a).

Acting under this rule, respondents establish and maintain a ceiling on commissions payable to the more than 4,000 agents in the United States who sell transatlantic passage for them. Any line is at liberty to pay less than this maximum commission (App. 78-79a), but each line, including lines not serving United States ports, has a veto over any line paying more.

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[3] Since the powers of this "private government" are derived, in large part, from the exception to the antitrust laws provided by the Shipping Act, the Commission must provide adequate surveillance and regulatory control. *Cf. Steele* v. *Louisville & Nashville Railroad,* 323 U. S. 192, 198 (1944) (setting limitations on the power of a private body, deriving part of their power from governmental approval, "* * * to deny, restrict, destroy or discriminate against the rights of those for whom it legislates * * *"); *See also American Communications Association* v. *Douds,* 339 U. S. 382, 401 (1950); *Smith* v. *Allwright,* 321 U. S. 649 (1944).

The Examiner found that "at least seven of the members [APC lines] engage in little or no service to or from the United States" (App. 421a) and recommended that they be barred from voting on agents' commissions because "* * * compensation paid to agents here is none of their concern." (App. 444a).[4] Only with this *limitation,* did the Examiner recommend that the remaining APC lines be permitted to vote unanimously. At the same time, however, the Examiner recommended that unanimous voting in the TAPC be abolished (App. 444-45a).[5]

If adopted, the Examiner's disfranchisement of the seven lines not serving United States ports would have reduced unanimity of 25 lines to unanimity of the 18 conference members which do provide such service, effectively changing APC voting to a three-fourths rule. Although the Commission adopted all of the other recommendations of the Examiner, it elected to preserve for each line the right to vote, provided the veto power held by each line, including those not serving the United States, was abolished through elimination of the unanimity rule.[6]

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[4] Lines not serving U. S. ports which could veto changes in U. S. agents' commissions were: Donaldson, Europe-Canada, Johnston-Warren (Furness), Incres, Oranje, Polish Ocean and Portuguese; at least one (Polish) was controlled by a Communist government (App. 120a, 620-25a).

[5] Article 3(d) of Agreement 7840 (App. 210a); respondents took no exception to this change and today operate under a three-fourths voting rule in the TAPC. However, the TAPC has no control over commissions paid to agents.

[6] "It is sufficient for our purposes here merely to say that, with the Unanimity Rule having been eliminated, we have no objection to such lines having some voice in commission matters * * *" (App. 487a).

The record also disclosed that through the TAPC "tieing rule" (App. 171a), respondents took collective action to prohibit any agent representing them from selling passage on a competing non-conference vessel (See p. 47, *infra*). Both Examiner and Commission disapproved the rule (App. 440-41a, 484-85a).

Both Commission and Examiner agreed that respondents must show "reasonable justification" for their rules (App. 469-70a, 474-75a, 439a) and that "the Commission must make sure that the conduct it legalizes under section 15 does not invade the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Act" (App. 484a, 438a).[7] Respondents took no exception to these standards.

The Commission found that respondents had not shown "reasonable justification" or need for the tieing rule, that the rule invaded antitrust prohibitions more than necessary to serve Shipping Act purposes, and that no adverse consequences to respondents would flow from its abolition (App. 484-85a).

The Commission found, *inter alia*, that the unanimity rule had blocked increases in commissions advocated for years by a strong majority of the lines, and accordingly agents, the principal sales force of the lines, had diverted traffic to airlines, respondents' chief competitors, because of the airlines' effectively larger commissions (App. 466-69a, 475-78a).[8] This resulted in a competitive disadvantage

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[7] Citing *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57, *cert. denied sub nom., Japan-Atlantic & Gulf Conference* v. *United States*, 347 U. S. 990 (1954).

[8] Although point-to-point commissions for both air and ocean carriers became numerically similar when respondents finally

to the steamship lines and less than complete and effective service to the public (App. 478a).

The Commission noted that evidence of how the unanimity rule had operated had been difficult to obtain because of "a deliberate conference policy to avoid government review of conference action * * *. By its own admission the conference purposely adopted this practice because of its concern over the American antitrust laws" (App. 456a, 476a; see also App. 49a, 61a, 277a).[9] Despite respondents' obstructionism, the Commission found sufficient evidence that the rule had blocked majority action and had operated to the detriment of commerce. It also determined that the rule had the *potential* to block action "even though favored by an overwhelming majority" (App. 476a). This potential to injure commerce was an additional ground for disapproval of the rule.

B. *The First Appeal.*

On appeal, respondents argued that the Commission had applied strict antitrust concepts to the tieing rule, without regard to the tests for disapproval of conference agreements provided by the Shipping Act. They attacked the Commission's ruling on unanimity as contrary to tradition,

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achieved unanimity for a commission change in 1957 (after six years of frustration), air commissions were found to be *effectively* greater due to the much greater amount of time required to sell ocean passage.

[9] The Examiner found that the "failure of the conference to take and record the votes of its members, to keep detailed minutes of proceedings, and report them to the Commission materially interferes with the regulatory surveillance which the Commission is required to maintain over conference activities" (App. 446a; see also App. 423a). No exception was taken to this finding by respondents. They belatedly appealed the Commission's order requiring them to keep more adequate records but then abandoned this appeal.

inconsistent with prior administrative approvals and lacking in evidentiary basis.

The court below apparently agreed with respondents on the tieing rule, although the opinion here is ambiguous. In the text the court said: "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles * * * " (App. 527a). Ambiguity arises from the footnote added by the court which suggested that the Commission should not "completely separate itself from antitrust principles" (*Ibid.*). Not ambiguous, however, was the court's conclusion that the Commission had failed to make a specific finding that "the rule operates in one of the four ways which Congress in 46 U. S. C. §814 prescribed for disapproval * * * " (App. 528a).

The court below also rejected the Commission's disapproval of the unanimity rule, in part on the mistaken ground that the Examiner had "approved" the rule (App. 521a).[10] The court found the Examiner's reasoning more "persuasive" than that of the Commission (App. 523a). It "disagreed" with the conclusion reached by the Commission that less complete and effective service resulted from the unanimity rule's freezing effect on commissions and consequent loss of motivation to agents (App. 522a). It also rejected the Commission's finding that the rule had the potential to block conference action, holding that even if it did so "permanently" it "is not in our view a sufficient reason under the statute for disapproval * * * " (App. 524-25a).

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[10] The court below was mistaken in this regard because as noted, *supra*, p. 8, the Examiner had substantially *limited* unanimity by disfranchising 7 lines not serving United States ports.

On June 10, 1965, the case was remanded to the Commission which was directed with respect to the unanimity rule:

> "* * * either to make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or, if this cannot be done to vacate that ultimate finding and approve the contract in this respect" (App. 525a)

and with respect to the tieing rule:

> "* * * that either an adequately supported ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U. S. C. §814" (App. 528a).

C. *The Commission Report on Remand.*

In compliance with these directions, the Commission reopened proceedings for briefing and oral argument. Neither the court below nor any party requested that additional evidence be taken. On July 20, 1966, with a new member in the majority and the same dissent, the Commission issued its report on remand, dealing exclusively with the two rules remaining in issue, and disapproving both on grounds that they are (a) detrimental to commerce, (b) contrary to the public interest and (c) unfair or discriminatory as between carriers.

The Commission acknowledged at the outset that it was required to reconcile "two statutory schemes embodying somewhat incompatible policies * * * the antitrust laws

* * * and the Shipping Act * * * " (App. 542a) and that Congress had assigned to it the task of "strict administrative surveillance of shipping conferences, agreements and operations * * * " (App. 543a).[11] Indeed Congress had questioned whether *any* conference rules should be permitted which require more than a *majority* vote, leaving this issue to be decided by the Commission (App. 548-49a).[12]

Resolving this issue, the Commission observed, had been rendered more difficult by the failure of respondents to keep adequate records of their proceedings, as required by law. This had "caused whatever evidentiary sketchiness exists in this proceeding as to the effect of the unanimity rule, and the responsibility for that failure cannot be shifted to the Commission." (App. 554a).[13]

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[11] ANTITRUST SUB-COMMITTEE ON THE JUDICIARY, THE OCEAN FREIGHT INDUSTRY, H. R. REP. No. 1419, 87th Cong., 2d Sess. 381 (1962) ("The Celler Report"); HOUSE COMM. ON THE MERCHANT MARINE AND FISHERIES, STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H. R. DOC. No. 805, 63rd Cong., 2d Sess. 418 (1914) ("The Alexander Report") ("abuses connected with steamship conferences * * * are inherent and can only be eliminated by effective government control * * * "); see also discussion at p. 7, n. 3, *supra*.

[12] The Senate Committee which referred the matter to the Commission noted that out of 113 shipping conferences serving United States ports, 73 employ no unanimous voting rule. S. REP. No. 860, 87th Cong., 1st Sess. 15 (1961).

[13] See discussion at p. 10, *supra*. In pre-hearing conference, respondents were ordered to produce records of their actions and were warned by the Examiner that failure to do so would subject them to "unfavorable inferences" (App. 4a). More than half of the respondents failed to produce any record of votes cast (see, *e.g.*, App. 631-39a). During the hearings testimony was introduced by agent witnesses (which was never rebutted by any conference witness) which bore on the "sketchiness" of the conference records. Agent witnesses testified that at meetings they had with the APC, conference officials stated:

> "Well, if you must know, as long as you have Congressman Celler, the Sherman Anti-Trust Act and other governmental

There was sufficient evidence, however, for the Commission to find that a strong majority of respondents had attempted to improve their competitive position by raising the ceiling on agents' commissions to 7½% throughout the year and would have done so in 1950, twice in 1951, and again in 1956, but had been blocked by the unanimity rule, so that commissions were frozen at levels lower than those paid by their major competition, the international airlines (App. 535-36a). This induced agents to "push" air travel and contributed to a decline in sales of ocean passage (App. 536-38a, 558-59a). The decline in respondents' competitive position resulting from the rigidifying effects of the unanimity rule was found to constitute detriment to the water-borne commerce of the United States.

In response to the directions of the court below, the Commission made the following additional findings, *inter alia*, to support disapproval of the rules:

> (1) But for the unanimity rule, a higher commission ceiling would have been adopted by respondents, and this would have enhanced their competitive position (App. 560-61a).
>
> Absence of this specific finding from the Commission's first report had been characterized by the court below as "most significant" (App. 524a).
>
> (2) Because of the unanimity rule, respondents paid agents only 7% on tour commissions while airlines

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inquiry bodies, we do not intend to have minutes published or circulated" (App. 61a).

* * *

"We were told we could not have any minutes or the meeting would have to disband, and the statement was further made that we can never have any minutes as long as you have those antitrust laws in the United States" (App. 49a).

paid 10%, a factor contributing to the "definite tendency [of agents] to sell air travel" and thus to the detriment of ocean commerce (App. 536-37a).

This finding of *actual* disparity between sea and air commissions supplemented earlier findings of "effective" disparity between numerically equal point-to-point commissions (App. 477a)[14] and provided an *a fortiori* demonstration of how respondents' voting rule blocked changes which would have improved their competitive position.

(3) By preventing a majority of carriers from taking action, the unanimity rule operated in a manner "inimical to the very nature of the conference as a voluntary association" and deprived it of "sufficient flexibility * * * to alter action which the members may have once found desirable but later appears to thwart their desires", with resultant unfairness as between carriers and detriment to commerce (App. 555-57a).

No finding on this point had been made by the Commission in its first report.

(4) No justification or need for the unanimity rule had been shown by respondents, and there was no evidence that the rule served a Shipping Act purpose or policy to outbalance its anticompetitive aspects; therefore, under the standards adopted by the Examiner and by the Commission, the rule was contrary to the public interest as that term is used in the Act (App. 559-61a).

In its first report, the Commission did not evaluate the unanimity rule in terms of these standards.

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[14] See discussion at p. 9, n. 8, *supra*.

(5) No justification or need for the tieing rule had been shown by respondents; under the standards discussed above and on a similar evaluation of anti-competitive consequences and Shipping Act policy, the rule was "contrary to the public interest" (App. 566a).

The Examiner and Commission had originally concluded that the anti-competitive effects of the tieing rule could not be justified, but neither had related such findings to the statutory public interest test, as required by the court below.

(6) Because of the tieing rule, non-conference lines have been denied access to agents booking 80% of the transatlantic passenger steamship business and this is discriminatory as between conference and non-conference carriers (App. 562a).

No finding on this point had been made by the Commission in its first report.

(7) As a result of the tieing rule, (a) agents have been unable to book travelers on non-conference vessels, (b) the latter have been denied access to agents and (c) the public has been denied the right to have agents arrange non-conference travel, to the detriment of the commerce of the agents, the non-conference vessels and the public (App. 565a).

No finding of detriment to commerce resulting from the tieing rule was made by the Commission in its first report.

In making findings (4) and (5) above, the Commission construed the duties imposed upon it by the public in-

terest test incorporated in Section 15 of the Shipping Act in 1961 (46 U. S. C. § 814), as follows:

> "The determination to approve or to allow continued approval of an agreement requires, on the one hand, consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws and, on the other, a consideration of the circumstances and conditions existing in the particular trade in question which the anticompetitive agreement seeks to remedy or prevent. * * *
>
> "* * * The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise * * * it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended, and the agreement is contrary to that interest within the meaning of section 15. * * *" (App. 544-45a).

The Commission concluded that it had a positive duty to test the conference agreements in this fashion without regard to prior administrative approval:

> "* * * Disapproval of an agreement on this basis is not grounded on any necessary finding that it violates the antitrust laws but rather because the anticompetitive activity under the agreement invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act and is therefore contrary to the public interest." (footnote reference to similar construction given Federal Aviation Act omitted) (App. 545a).

D. *The Second Appeal.*

Again respondents took an appeal to the Court of Appeals for the District of Columbia Circuit, attacking the Commission this time for failing to obtain new evidence and for relying on a *per se* test of antitrust illegality. On January 19, 1967, in a brief opinion, the court below stated that it found nothing in the report on remand to change the views expressed in its prior opinion and reversed the Commission's order as "* * * arbitrary and capricious and not supported by substantial evidence * * *" (App. 651-54a).

Summary of Argument

I.

The Commission properly determined on remand that it must evaluate respondents' unanimity and tieing rules in terms of the competing statutory schemes (Shipping Act and antitrust laws) and make findings as to whether the rules should be disapproved under the public interest test of Section 15 of the Shipping Act. The Commission's findings were not based on a *per se* test of illegality, although both rules would be unlawful *per se* under the antitrust laws. The unanimity rule is an extreme form of price fixing, binding respondents to pay agents no more than a fixed commission until agreement of all respondents can be secured to increase that commission. The tieing rule operates as a group boycott of any agent who serves a non-conference line. The rules were found to be contrary to the public interest within the meaning of Section 15, because no Shipping Act purpose or justification could be found for them.

The holding of the court below that such findings are insufficient to support disapproval of the rules is erroneous as a matter of law.

The Commission was required to "reconcile" the Shipping Act and the antitrust laws. *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 357 (1963); *Denver & Rio Grande Western Railroad Co.* v. *United States,* 387 U. S. 485, 492-94 (1967); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86-87 (1944).

The antitrust laws are "fundamental national economic policy" and must therefore be in the public interest. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966). Under other statutes, consideration of the "public interest" requires agencies administering those statutes to weigh anticompetitive considerations. *Denver & Rio Grande Western Railroad Co.* v. *United States, supra.*

The Commission properly weighed the anticompetitive effects of the rules against the evidence presented to justify them. It found that abolition of the rules would not interfere with the conference system or render concerted action by respondents unlawful. The Commission found that Congress had questioned whether any conference should be permitted to employ a voting rule requiring more than majority agreement. Most steamship conferences operate with no unanimous voting rule, and respondents themselves have neither unanimity or tieing rule in their Caribbean cruise trade.

The purpose of the tieing rule is to eliminate outside competition. Practices of conferences having this effect have long been condemned. *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U. S. 481 (1958). Since respondents

control 99% of the transatlantic passenger steamship trade, the Commission found no risk to conference stability or other justification for denying non-conference lines access to agents who book 80% of that business.

Respondents were given the opportunity to introduce evidence to demonstrate that their rules were required to fill a serious transportation need or secure other benefits. The evidence which they introduced failed to establish this. The Commission's decision that the rules must therefore be disapproved in order to reconcile the Shipping Act and the antitrust laws should have been affirmed.

II.

Where Congress has provided a broad statutory term under which an agency is to act, the task of a reviewing court is limited to determining whether there is warrant in the record and a reasonable basis in law for the agency's decision. This is particularly true of determinations as to what is in the public interest. *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U. S. 357, 367-68 (1965); *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 535-36 (1946). The Commission's determination that the antitrust laws are in the public interest should not have been rejected by the court below.

The Commission's findings that the rules were unfair and discriminatory as between carriers and detrimental to commerce were independent grounds on which the Commission properly disapproved the rules. In dealing with these findings, the court below disregarded the instructions of this Court that it must not substitute its discretion for that of the Commission even though the evidence might permit the drawing of "inconsistent conclusions". *Consolo*

v. *Federal Maritime Commission*, 383 U. S. 607, 619-20 (1966). In relying upon its original (pre-*Consolo*) opinion as the basis for reversal of the challenged rules, the court below ignored the substantial evidence test. It also rejected the discretionary relief fashioned by the Commission and committed further reversible error in finding the Examiner's recommended solution to the problems created by the unanimity rule more "persuasive" than that ordered by the Commission.

There was substantial evidence to support the findings of the Commission. This evidence consisted in large part of testimony and documents of respondents themselves in which the adverse effects of their rules was admitted. There was also testimony by agents and statistical data to confirm this.

The task of evaluating internal procedural rules of the conferences was a difficult one, resting upon a complex and hard-to-review mix of considerations. It was rendered more difficult by the policy of concealment adopted by respondents to obstruct the regulation called for by the Shipping Act, including these very proceedings. The Commission found that such concealment had occurred and was entitled to draw inferences adverse to respondents as a result thereof. There could be no more compelling record for disapproval of the rules in question than the one upon which the Commission acted.

III.

The Commission's disapproval of the unanimity rule should have been affirmed by the court below since it was correct on independent grounds the court was competent to formulate. *Securities and Exchange Commission* v. *Chenery*

Corporation, 318 U. S. 80, 88 (1943); *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937); *Chae-Sik Lee* v. *Kennedy,* 294 F. 2d 231, 234 (D. C. Cir.), *cert. denied,* 368 U. S. 926 (1961). Three major international airlines had interlocking directorates and/or common ownership with three of the respondents and the power thereby to cause the casting of a veto over any action by respondents on agents' commissions. Such relationships are prohibited between domestic competitors because of their potential to effect concerted action in restraint of trade. *Cf. United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 616 (S. D. N. Y. 1953). The Commission's disapproval of the unanimity rule on other grounds rendered it unnecessary to deal more specifically with the illegality inherent in a rule which gives purported air competitors veto power to effect a restraint on respondents' actions. However, if the Commission had not disapproved the rule on those other grounds, it would have been obliged to do so as a matter of law on this ground, since it has no jurisdiction to approve concerted action between air and ocean conferences. *See United States* v. *Far East Conference,* 94 F. Supp. 900-03 (D. N. J. 1951), *rev'd on other grounds,* 342 U. S. 570 (1952). Failure of the court below to affirm the decision of the Commission on this independent ground was also reversible error.

ARGUMENT

I.

The Commission's findings that the unanimity and tieing rules invade the prohibitions of the antitrust laws more than necessary to further the purposes of the Shipping Act dictate disapproval of such rules.

When the Commission disapproved respondents' unanimity and tieing rules, it acted on the premise that the antitrust laws are in the public interest and that rules which are clearly contrary to the antitrust laws must be disapproved under the public interest test of the Shipping Act, absent evidence that the rules are necessary to serve the purposes of the Act. Respondents' agreements were not disapproved in whole, even though they represent collective action of competitors in violation of the antitrust laws, since disapproval of the conference system would defeat the purposes of the Act. As will be shown herein, the disapproved rules are excessively anticompetitive, the Commission's premise of law was a proper one, and the result was dictated by respondents' failure to demonstrate a valid Shipping Act purpose for either rule.

Agreement among respondents on maximum commissions payable to agents in the United States is price-fixing and a *per se* violation of the antitrust laws.[15] Agreement never

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[15] Agreements having the effect of freezing prices, rates or commissions have long been condemned as *per se* violations of the antitrust laws. *See United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397 (1927):

> " * * * The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged

to change such collectively-fixed commissions unless *all* lines agree constitutes the ultimate in price-fixing. It is this extreme measure which is put in issue by the APC unanimity rule, for the Commission did *not* disapprove collective action on commissions by a less than unanimous vote of the conference.

Agreement among respondents under the TAPC tieing rule that they will terminate any agent who deals with a non-conference line constitutes a group boycott, another *per se* antitrust violation.[16] Application of the tieing rule by a group controlling 99% of the market, as do respondents, would also be an unreasonable restraint of trade.[17]

Although the unanimity and tieing rules would be unlawful *per se* under the antitrust laws, the Commission did *not* disapprove them on this basis. Rather, disapproval of these rules was based on the finding that the anticompetitive characteristics of the rules outweighed any justification shown for them and they were, therefore,

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because of the absence of competition secured by the agreement for a price reasonable when fixed. * * * "

See also United States v. *National Association of Real Estate Boards,* 339 U. S. 485 (1950); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948); *United States* v. *Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150 (1940).

[16] *United States* v. *General Motors Corp.,* 384 U. S. 127 (1966); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U. S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1959); *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457 (1941).

[17] *See Mytinger & Casselberry, Inc.* v. *Federal Trade Commission,* 301 F. 2d 534, 538 (D. C. Cir. 1962) (holding unlawful, as unreasonable restraints of trade, exclusive dealing contracts by which petitioners controlled only 62% of the market). *See also United States* v. *General Motors Corp.,* 121 F. 2d 376 (7th Cir. 1941), *cert. denied,* 314 U. S. 618 (1941); *Vitagraph, Inc.* v. *Perelman,* 95 F. 2d 142 (3rd Cir. 1936).

"contrary to the public interest" within the meaning of Section 15 of the Shipping Act (App. 561a).

The lower court's rejection of the construction given the public interest test by the Commission is erroneous as a matter of law.[18] The Commission was required by the statute and by the decisions of this Court to "reconcile" the competing statutory schemes (Shipping Act and antitrust laws), "rather than holding one completely ousted." *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 357 (1963); *see also Denver & Rio Grande Western Railroad Co.* v. *United States,* 387 U. S. 485, 492-94 (1967); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86-87 (1944).

If the Commission had approved the unanimity rule without an adequate showing of need or other justification, it would have held the antitrust laws "completely ousted", for the vice condemned in *Trenton Potteries, supra,* existed here: commissions "once established" were "maintained unchanged", even against the business judgment of the majority of respondents.[19] The APC unanimity rule in fact goes beyond the *Trenton Potteries* type of restraint. The rule establishes a price freeze not by two competitors, nor by a majority of competitors, but by *all* competitors,

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[18] That the court below did reject this construction of Section 15 is now clear. In its first opinion, the court said: "We do not read the statute as authorizing disapproval of an agreement on the grounds it runs counter to antitrust principles * * * " (App. 527a); in its second, the court rejected, without comment, the Commission's reconciliation of the competing statutes and its finding of a Shipping Act violation, even though the footnote accompanying the court's language in its first decision above had appeared to call for such consideration (see discussion at p. 11, *supra*).

[19] There is no doubt that this fact was borne out by substantial evidence on the record considered as a whole. See part II, pp. 34-49, *infra.*

each of which is powerless to break the frozen structure without the consent of every other line.

In an analogous case involving unanimous voting on fares by the international air carriers' conference ("IATA"), the Civil Aeronautics Board, operating under a public interest test, held:

> "It is further understood that it is not intended that a rate established by conference agreement thereafter can be changed only by unanimous action. Such a requirement would enable a single carrier to freeze the rate structure, and would create an intolerable situation." *IATA Traffic Conference Resolution,* 6 C. A. B. 639, 645 (1946).[20]

The APC unanimity rule has created such an "intolerable situation" for respondents, who are unable to change the rule unless they obtain unanimous agreement to do so (App. 552-53a), and for the travel agent industry which is dependent in part on commissions paid by respondents. Agents have no countervailing economic power. Forbidden by the antitrust laws to take collective action, they cannot strike. Yet they are regulated as to what they can charge, whom they may serve and how they operate by another industry, whose antitrust exemption, according to the court below, appears unlimited.

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[20] Although the C. A. B. permitted air carriers initially to *try* to establish rates by unanimous agreement, it insisted that they should have freedom to act independently if agreement were not achieved (6 C. A. B. at 645): "The right of independent action * * * must be scrupulously preserved * * * an air carrier * * * will be free to initiate its own rates if such consultation has not resulted in agreement * * *." The C. A. B. also insisted that all agreements must provide for "termination within a reasonable period." (*Ibid.*) The APC agreement contains no such limitations.

If the Commission had approved the tieing rule, which is intended to eliminate non-conference competition,[21] without a showing of necessity for the rule, it again would have held the antitrust laws "completely ousted". Such approval would also run contrary to the principles laid down by this Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 491 (1958):

> "* * * the freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves. The Congress in § 14 has flatly prohibited practices of conferences which have the purpose and effect of stifling the competition of independent carriers. * * *"

The Commission's obligation to apply "strict administrative surveillance" and regulatory control over such excessively anticompetitive practices was manifest. It became even more manifest in the period between its first and second reports (1964 and 1966, respectively). For before the report on remand was issued, this Court concluded that the Shipping Act provides only a *limited* antitrust exemption and that the antitrust laws represent "fundamental national economic policy". *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 218 (1966). In *Carnation,* this Court rejected the argument that Congress intended to give the shipping industry a broad antitrust exemption[22] and declined to construe the Shipping Act as

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[21] The Commission found: "Respondents admit that the purpose of the tieing rule is to eliminate outside competition, and that purpose has obviously been achieved." (App. 563a).

[22] The holding in *Carnation* is directed to conference action taken under an agreement not approved by the Commission; but the Court's discussion of the statute and its relationship to the antitrust laws is directly in point.

"an implied repeal of the antitrust laws" (383 U. S. at 218-19):

> "The Congress which enacted the Shipping Act was not hostile to antitrust regulation. * * * [It] concluded that the conference system had produced substantial evils and that it should not be permitted to continue without governmental supervision."

It follows that since the antitrust laws have not been repealed by the Shipping Act but are "fundamental national economic policy" they must be in the "public interest" within the meaning of Section 15. The Court recently held this to be true of the Interstate Commerce Act's public interest test in *Denver & Rio Grande Western Railroad, supra*: " * * * terms such as 'public interest' * * * require consideration of * * * anticompetitive effects." (387 U. S. at 492). The Commission's premise of law was therefore proper. It had no choice but to weigh anticompetitive effects and Shipping Act policy and apply its expertise to the evidence presented in balancing the interests represented by these two statutory schemes.

Having found that the unanimity and tieing rules appeared excessively anticompetitive, the Commission called upon respondents to justify continued approval of the rules:

> " * * * The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. * * * " (App. 544a).

Such proof was peculiarly within respondents' knowledge and control and clearly more available to them than to the Commission. Even if this were not to be the general rule applicable to those seeking antitrust exemption, it surely must apply to respondents herein, whose deliberate policy of concealment of their activities rendered the Commission's investigation so difficult (See pp. 10, 13, *supra;* p. 48, *infra*).

The court below, however, appears to have placed an affirmative burden of proof on the Commission to show that the antitrust exemption should not be absolute, stating in its decision after remand (App. 652-53a):

> "There is no doubt whatsoever that the petitioner conference was authorized by * * * the Shipping Act * * * to act in concert in all shipping matters *until and unless* the actions were found illegal by the Commission * * *." (Emphasis added.)

This reading of the statute is clearly error, since antitrust exemption for conference activities is not automatic; it is only granted after a conference files an agreement with the Commission and after that agreement receives Commission approval. The conference must apply for its exemption and, as any applicant must do when questioned, show that it deserves being granted.

Respondents below argued that prior approvals of their agreements foreclosed the Commission from disapproving their rules. The court properly concluded there was "no merit" to this defense,[23] but went on to suggest that

[23] It could scarcely have ruled otherwise, since the statute authorizes disapproval of an agreement "whether or not previously approved" (46 U. S. C. §814).

agency disapprovals following earlier approvals should be "scrutinized by a reviewing court with greater care" (App. 521a). But prior administrative rulings which are not made in "adversary proceedings" are not entitled to such weight. *Fishgold* v. *Sullivan Dry Dock & Repair Co.*, 328 U. S. 275, 290 (1946). The Commission's prior approvals here were routine; it could not, and did not, subject the thousands of documents filed each month by various shipping conferences to more than perfunctory scrutiny.[24] Where there has been no adversary proceeding and "no expressed administrative determination" the Commission's prior approvals represent mere "negative action" (*i.e.*, failure to disapprove) which cannot be elevated to the status of "positive administrative decision". *Baltimore & Ohio Railroad* v. *Jackson*, 353 U. S. 325, 330-31 (1957).

The court below may have acted on the assumption that a greater weight of evidence was called for here because of the mistaken belief, expressed in its first opinion, that our national policy encouraged participation in steamship conferences "to be governed by unanimity" (App. 518a). No authority exists for this proposition.[25]

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[24] *See* DEPUTY ATTORNEY GENERAL, LETTER, S. REP. No. 860, 87th Cong., 1st Sess. 31 (1961); Petition for Writ of Certiorari, pp. 18-20, filed by the Commission in *Isbrandtsen Co.* v. *United States*, *supra*, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 11-13 (Monograph No. 4, 1940); MARX, INTERNATIONAL SHIPPING CARTELS, 110-113 (1953); Note, *Federal Maritime Board Procedure and the Legality of Dual Rate Shipping Contracts*, 64 YALE L. J. 569, 572 (1955).

[25] The Alexander Report, cited at p. 13, *supra*, did not endorse unanimity; no Congressional Committee has done so; on the contrary, at least one Congressional Committee has seriously questioned the practice (p. 13, *supra*). The voting rule discussed in the speech by the former C. A. B. chairman is wholly different from that of respondents, for the C. A. B. so limited IATA procedures that it effectively eliminated unanimity as a meaningful concept (p. 26, *supra*).

There was no credible evidence upon which to base continued approval of the challenged rules. For example, a conference witness testified that unanimity had not indefinitely "blocked majority action"; but the same witness admitted that it had taken years to obtain unanimity, and conference documents bear this out (see pp. 41-45, *infra*). Another testified that the rule served as a "safety valve" to protect the minority of American carriers. He admitted, however, that one "safety valve" would be sufficient to protect a line against having to pay more commissions than it could afford and that each line had such protection, since it could pay less than the maximum commission (App. 78-79a). No witness tried to explain how the rule could protect the minority and at the same time not block majority action; nor did any witness explain the fact that most steamship conferences use no unanimity rule, take collective action which is binding on all members (although agreed upon by a less than unanimous vote), and do so without impairing the Shipping Act purpose of permitting carriers to act collectively and without harm to American lines.[26]

It may well be that there can be no justification shown for any unanimous voting rule, as Congress has suggested (p. 13, *supra*), but certainly no *per se* test was applied here.[27] The Commission considered "the circumstances and

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[26] As noted at p. 8, *supra*, respondents themselves did not appeal that portion of the Commission's first order directing them to abandon the unanimity rule in the TAPC and now operate with a three-fourths voting rule in that conference; nor did respondents explain how they themselves operated cruises in the Caribbean without any conference, let alone any unanimity or tieing rules.

[27] Unanimous voting, under controlled conditions, could perhaps be justified if, for example, the voting affected only conference

the conditions existing in the particular trade" (App. 544a) and made its decision on how the rule worked in *this* conference.[28] Respondents' argument below that the Commission refused to find the 7% commission ceiling unlawful, and therefore could not find the procedure by which it was set unlawful, is both incorrect and irrelevant. It was entirely within the Commission's discretion to limit disapproval to the "procedure" by which that ceiling was fixed.[29] The issue is analogous to that under the antitrust laws where the procedure by which a price is established is a wholly separate and unrelated question to whether the price is a reasonable one. *United States* v. *Trenton Potteries, supra.* The Commission properly disposed of the point as follows (App. 550a):

> "* * * [I]t is entirely incorrect to conclude that the particular level fixed must be found unlawful before the 'procedure' itself can be ordered modified. In dealing with the unanimity rule itself we are faced with a

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members, the agreements were limited in duration and failure to achieve agreement left each carrier free to take independent action; the latter two conditions would serve to induce changes, rather than indefinitely freeze action.

[28] Indeed, the record showed that some of the members of *this* conference are also members of other steamship conferences (App. 217-19a) and may have misused the veto power of the unanimity rule to further the purposes of such other conferences with regard to the ceiling on agents' commissions; no antitrust exemption for such concerted action had been secured under the Shipping Act (see App. 112-13a, 317-21a).

[29] In *IATA Traffic Conference Resolution,* p. 26, *supra,* the C. A. B. ruled only on the "procedure" by which air fare rates were established (6 C. A. B. at 643):

> "The issue before us here is * * * whether the rate conference *procedure* will be destructive of the policy of competition which the Congress has declared and to which this board is committed." (Emphasis added.)

> consideration as to what degree we will permit the respondents to go in rigidifying or circumscribing the flexibility of their operations under an anticompetitive agreement—a far different substantive determination than one as to whether a given rate, fare, charge or commission fixed under a particular procedure is itself valid under the law. * * * "

Respondents' arguments as to the possible Shipping Act value of the tieing rule were similarly weighed against the anticompetitive effects of the rule. The Commission found that there was no risk from outside competition, no risk to conference stability and no service rendered by the conference to agents sufficient to entitle respondents "to maintain a complete foreclosure over agents' services for non-conference lines" (App. 564a). At one point in the hearings below, respondents attempted to show that the rule protected travelers against possible fraudulent non-conference operations. But their witness admitted that when a conference line (Arosa) went bankrupt, failed to make refunds to the traveling public or pay commissions to agents, neither the tieing rule nor the conference afforded any protection to the public or the agents (App. 10-12a, 144a).

Respondents thus tried to persuade the Commission of "necessity" for the challenged rules. Their subsequent argument that they had no obligation to do so emphasizes how complete was their failure of proof.

The excessively anticompetitive effects of the unanimity and tieing rules have been found to run counter to the prohibitions of the antitrust laws. Abolition of the rules has been found to cause no impairment to the purposes of

the Shipping Act, since collective action can still be taken by respondents without the unanimity rule, and no risk to conference stability or other injury has been found without the tieing rule. Thus, by disapproving the rules, the Commission properly reconciled the two statutory schemes.

II.

The Commission's disapproval of the unanimity and tieing rules was not arbitrary and capricious, was supported by substantial evidence on the record and should have been affirmed by the court below.

Because of the need for development and application of expertise in certain fields, many administrative agencies have been given discretion to operate under broad statutory guidelines. The proper scope of judicial review of decisions of such agencies has often been considered by this Court:

> "Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision has 'warrant in the record' and a reasonable basis in law. * * * While the final word is left to the courts, necessarily 'we give great weight to the Commission's conclusion * * *'." *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U. S. 357, 367-68 (1965).

This principle has been applied specifically to agency determinations of what is encompassed by the "public interest":

> "It is not true * * * that 'the courts must in a litigated case be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute." (Footnote omitted.) *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 535-36 (1946).

Determining that the antitrust laws are in the public interest and that the unanimity and tieing rules violate that interest, as discussed in Point I, *supra,* was thus the "Commission's business", not that of the court below which "is without authority to intervene * * * [or] substitute its own view * * * with reference to competitive considerations or others, for the Commission's judgment * * * if that has support in the record and the applicable law." (*Ibid.*) By any standards, there was support in the record and the applicable law for the Commission's finding that the rules violate the public interest. As will be shown herein, there was also such support for the Commission's findings of detriment to commerce and discrimination and unfairness as between carriers, the additional statutory grounds upon which the rules were disapproved.

A. *The court below disregarded principles of judicial review established by this Court and substituted its conclusions for those of the Commission.*

In *Consolo* v. *Federal Maritime Commission,* 383 U. S. 607, 619-20 (1966), this Court instructed the court below that it must limit itself to determining whether the Commission's findings are supported by "substantial evidence", which it defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion":

> "'[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' * * * This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. * * * "

Consolo arose on certiorari from the Court of Appeals for the District of Columbia Circuit which had reversed another order of the Federal Maritime Commission because there was substantial evidence to support a contrary conclusion (342 F. 2d 924, 926-27). The court below (in an opinion written by the same judge who authored the first opinion herein) found that it did not "agree" with the result and that its views and conclusions with respect to the evidence differed from those of the Commission.

This Court reversed the court below in *Consolo* on March 22, 1966, *after* the first opinion of that court in the instant case in 1965, but *before* that court's reversal herein of the Commission's order on remand in 1967. The timing of these decisions is significant, because the court below based its final reversal of the Commission herein on the views expressed in its pre-*Consolo* opinion:

> "We are not satisfied that the Commission has made adequate response to our mandate to eliminate the doubts and problems we pointed out in our prior [1965] opinion." (App. 654a)

But those "doubts" and "problems" were predicated on a standard of review applied by that court in 1965 which

was held by this Court to be "not consistent with that provided by the Administrative Procedure Act" (383 U. S. at 619). Reliance upon its pre-*Consolo* opinion can only be explained as deliberate disregard of this Court's holding in *Consolo* or failure by the court below to realize that in its earlier opinion herein it had rejected agency expertise, ignored the substantial evidence test and drawn inconsistent conclusions from the evidence.

Two notable examples of this treatment of the agency report are as follows:

(1) The Commission had made findings in its original report that the unanimity rule was responsible for a disparity in commissions between air and ocean carriers which caused agents to push air travel and thus provided both the public and the carriers with less than complete and effective service, with detriment to commerce resulting therefrom (App. 478a). In its pre-*Consolo* opinion, the court below rejected these findings, stating: "* * * *we cannot agree* that the unanimity rule prevents complete and effective service by travel agents. * * *" (App. 522a). (Emphasis added.)

(2) The Commission originally found that there was evidence that the unanimity rule had blocked the desires of the majority of respondents to raise commissions, putting them at a competitive disadvantage with their major competitors, the international airlines, with resulting detriment to commerce (App. 478a). The Commission found this could result from "a single vote * * * even [against] an overwhelming majority * * *" (App. 476a). In its 1965 opinion, the lower court said: "The fact that the wishes of the majority

> may be blocked * * * in an extreme case even *permanently,* by the unanimity rule is not *in our view* a sufficient reason under the statute for disapproval * * * *" (App. 524-25a). (Emphasis added.)

But agreement by the court below with the agency's views is not the test of their adequacy, nor is the fact that the court below might have decided the issue differently had it tried the case. For, as this Court said in *Consolo,* "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (383 U. S. at 620).

That there was substantial evidence, sufficient to go to a jury on both points, cannot be denied. As to (1), there was testimony of agents[30] and of respondents' representatives,[31] as well as contemporaneous correspondence of respondents,[32] that showed agents pushed air travel at the expense of ocean passage because the former was substantially more remunerative, and that it was more remunerative because, among other things, the unanimity rule had blocked majority efforts to increase the commission ceiling.[33] A jury would have been entitled to draw

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[30] App. 22-23a, 27-28a, 29-30a, 31a, 37a, 38a, 42a, 45-46a, 62-65a. This testimony, as well as all other testimony of agents relating to operations of travel agencies and sales of international sea and air tickets, has been stipulated to be typical of the testimony which would have been adduced had additional travel agent witnesses been called (App. 56a).

[31] App. 104a.

[32] App. 243-45a, 279a, 289-90a, 311a, 312a.

[33] App. 39a, 50-51a, 77a, 117-18a, 121-23a, 131-32a, 136-37a, 276a, 278a, 279a, 281-82a, 285-86a, 316a, 322-38a, 339a, 344-47a, 605-06a, 608-09a, 610a, 627a.

from this evidence the conclusion reached by the Commission that the rule was responsible, at least in part, for agents rendering less than complete and effective service to respondents and to the traveling public and was therefore detrimental to commerce.

As to (2), there were admissions by respondents in correspondence of the competitive disadvantage they suffered because of the lower commission ceiling caused by the unanimity rule,[34] and testimony by their own representatives that the rule had frozen commissions for long periods of time (App. 121-23a; 136-37a). Statistical data confirmed that respondents had suffered a competitive disadvantage (App. 371-74a, 375a, 377a, 378a, 379a). Additionally, the Commission was entitled to draw inferences from what it found to be a "deliberate policy" of respondents to avoid governmental review adopted by them out of fear of the antitrust laws.[35] The lower court's "view" that even permanent paralysis of conference action would not be detrimental to commerce was an improper substitution of its judgment for that of the Commission.

The failure of the court below in its post-*Consolo* opinion to address itself to whether the evidence was "substantial"—*i.e.*, sufficient to avoid a directed verdict—on these two points is symptomatic of its approach to the case as a whole. At no point did the court below discuss the evidence, not even the evidentiary finding added on remand, absence of which the court had previously deemed "most significant" (App. 524a) (*i.e.*, "but for" the unanimity rule commissions would have been increased and this "would

[34] App. 243-45a, 279a, 289-90a, 311-12a; 374a-2.

[35] See pp. 10, 13, *supra;* p. 48, *infra.*

have enhanced" respondents' "competitive position") (App. 560-61a).

The decision below not only does violence to the "substantial evidence" standard of judicial review, but also negates the expertise of the regulatory agency's "fashioning of discretionary relief," a role this Court deemed "particularly important" in *Consolo* (383 U. S. at 620-21). The Court pointed out that "agency determinations frequently rest upon a complex and hard-to-review mix of considerations," and that Congress had placed a "premium upon agency expertise" (383 U. S. at 621). The importance of such expertise in regulating the maritime industry has long been recognized. *See U. S. Nav. Co. v. Cunard S.S. Co.*, 284 U. S. 474, 485 (1932).

But the court below disregarded the Commission's expertise in this "particularly important" function of fashioning discretionary relief in favor of a recommendation by the Examiner. The Examiner's proposed solution to the problem of diversion of travelers to airlines by agents was to have the conferences "amend their rules to prohibit such diversion" (App. 523a).[36] The court below found "this reasoning persuasive" (*Ibid.*) and rejected disapproval of the unanimity rule, the relief fashioned by the Commission.

The task of the court below, however, was not to decide whether the relief proposed by the Examiner was more

[36] The Examiner found that the unanimity rule had blocked changes in the commission ceiling advocated by a majority of the lines (App. 421-22a) and that higher commissions paid by airlines caused agents to divert traffic to them (App. 431a). Even the dissent to the Commission report admits "that preventing of [commission] changes has occurred" (App. 568a). There was thus no basic disagreement as to the underlying evidence, but only as to the proper ultimate conclusions to be drawn from such evidence.

"persuasive" than that ordered by the Commission. The proper role of the court was merely to determine whether there was warrant in the record and a reasonable basis in law for the Commission's decision. It was within the discretion of the Commission to adopt, modify or reject the Examiner's recommendations (a) that the conferences amend their rules to prohibit diversion, and (b) that the seven lines not serving United States ports be disfranchised. The relief ordered by the Commission was to eliminate unanimity and permit respondents to exercise their own business judgment to solve the problems which the Examiner sought to legislate away. The fashioning of such discretionary relief is the kind of administrative function which must be left to the regulatory agency. Failure of the court below to do so constitutes reversible error.

B. *The Commission's disapproval of the unanimity and tieing rules is supported by substantial evidence.*

The evidence of record provides more than ample support for the Commission's findings that the unanimity rule has operated to freeze for at least six years the ceiling on general commissions paid to agents by respondents and to freeze for at least two and one-half years the ceiling on tour commissions, with the result that the general commission level in 1963 was still below the ceiling advocated by a majority of respondents 13 years before (App. 554a).

The ceiling on general commissions payable to travel agents by respondents remained fixed at 6% from 1946 to 1957, except for a 7½% *off-season* rate which became effective in 1951 (App. 117-18a, 316a, 347a). Conference records show that, as early as March 8, 1950, some of the lines sought to increase this 6% ceiling to 7½% through-

out the year, but "unanimity was not obtainable" (App. 273a). Minutes of a conference meeting held on October 9, 1950 indicated:

> "The majority of Lines, however, were prepared to increase the commission to 7½% all classes, all seasons" (App. 276a).

Despite the desires of the majority, no action was taken at that time.

The "majority of Lines" continued to press for this across-the-board increase in the ceiling on commissions payable to agents in anticipation of the next conference meeting to be held on March 1, 1951 (App. 277-79a). At the meeting on March 1, 1951, the majority was unable to obtain unanimity to increase commissions throughout the year and settled for an increase to 7½% for the off-season only (App. 316a).

This compromise did not end the matter, however, for the majority still favored the increase in the ceiling on commissions payable to agents to apply throughout the year. Thus, the minutes of the October 8, 1951, APC meeting reported:

> "While there was a strong majority in favour of applying 7½% commission to all classes throughout the year, it was not possible to reach unanimous agreement" (App. 282a).

The matter was therefore "deferred for consideration at the statutory meeting in March 1952" (*Ibid.*). At that time, it was again deferred for three additional months (App. 329a) and, in June, deferred again for another four

months (App. 330a). Finally, on October 6, 1952, the subcommittee reported:

> "Unanimity could not be reached on a proposal to extend the off-season commission basis [7½%] to bookings for seasonal sailings". (App. 332a).

A similar proposal was again placed before the subcommittee meeting on March 5, 1953 and deferred to June 4, 1953, at which time action was indefinitely "deferred" (App. 340a).

The fact that only a minority of lines blocked action is reflected in the correspondence of United States Lines regarding the minutes of June 24-30, 1953:

> "It is assumed that there will continue to be the minority opposition to the uniformity of commission * * * " (App. 374a-6).

Indeed, "the minority opposition" to the 7½% ceiling on commissions throughout the year did continue. Blocked by the unanimity rule, the majority of lines gradually abandoned their proposal, although it was contrary to their best business judgment to do so (App. 374a-4–374a-7).

On March 1, 1956, the lines initialled an "Aide Memoire" (App. 374a-8) in which they generally agreed that something must be done to adjust the ceiling on commissions.[37] At that time, an "overwhelming majority of lines" favored a uniform commission of 7% all year (App. 254a). However, nothing was done at the March 1 meeting and the

[37] Respondents concealed this Aide Memoire from the commission and no minute reflecting this general agreement was filed because of respondents' policy to obstruct government review of their activities. See pp. 10, 13, *supra;* p. 48, *infra.*

record shows that such inaction was the result of a veto by one line.

> "The only line who indicated strong objection to an immediate adjustment in commission * * * was Norwegian American Line" (App. 374a-2–374a-3).

Finally, on May 7, 1956, the ceiling on general commissions payable to agents was changed to 7% for all seasons, but not to take effect until the following year (App. 346-47a). Since for at least six years before this change the commission ceiling for off-season bookings had been 7½%, the compromise finally adopted by respondents to achieve unanimity represented a lower commission ceiling for bookings during that period.

This evidence from respondent's own records as to the freezing effects of the unanimity rule is corroborated by the testimony of one of respondents' chief witnesses who attended nearly all APC meetings:

> "By Mr. Sisk: Q. Mr. Winchester, you stated in answer to the question just put to you by Mr. Neaher with respect to the unanimity rule that as best you can recall in every instance, the holdout or the minority line, the one which wouldn't go along eventually agrees, is that correct? A. That's correct.
>
> Q. That may take some time. A. That's right.
>
> Q. Years, in fact. A. That can.
>
> Q. No further questions.
>
> Mr. Neaher: Has there ever been an occasion when it has taken years?
>
> The Witness: Well, I think the final decision to increase the commission took quite a long time.

Mr. Neaher: You do? Because of one line?
The Witness: No, I don't say because of one line.
Mr. Neaher: Because of three?
The Witness: To get unanimity took a long time."
(App. 136-37a). (See also App. 121-23a.)

To this record of respondents' inability to raise the ceiling on general commissions payable to agents for six years may be added the testimony of agents reporting upon their efforts since 1956 to obtain a further increase in commissions. Several agents reported admissions by representatives of various member lines that the commission level could not be increased because of difficulty in achieving unanimity (App. 39a, 50-51a, 609-10a). APC minutes during this period corroborate their testimony, reporting that with respect to commissions the lines are "unable to agree" (App. 627a).

The freezing effect of the unanimity rule upon the level of commissions payable for foreign tours sold in connection with ocean passage is also documented by substantial evidence. During the period of the mid-1950's and early 1960's the unanimity rule prevented respondents from increasing their tour commissions from 7% to match the 10% paid by the airlines. Proposals for such an increase had been before respondents since at least 1955 (App. 256-57a, 294a, 303a, 310a, 359-60a). However, respondents were unable to achieve the "advantageous position at present enjoyed by the airlines" (App. 310a) on tours until December 1962. But the record shows that a majority favored establishing a 10% commission level for such tours in May 1960 (App. 374a-1, Principals Minute 378; App. 250-51a). It was only after the close of the hearings in these proceedings, with the threat of an adverse Initial Decision

hanging over their heads, that respondents finally achieved unanimity on this 10% tour commission.

The foregoing represented evidence which "a reasonable mind" would surely accept as "adequate to support a conclusion" that the unanimity rule had blocked changes in the commission ceiling advocated by the majority of respondents. This conclusion would in turn support the Commission's ultimate finding on remand that the rule was "* * * unfair as between the majority of carriers which desired the change and those few who blocked it" (App. 557a).

The Commission's ultimate finding that the rule was also detrimental to commerce was based on the evidence discussed above and on the evidence of the consequential effects of the frozen commission ceiling on agents, the lines and the public, discussed at pp. 37-39, *supra*. Surely no court would have directed a verdict where, *inter alia*, there are admissions of such adverse consequential effects by respondents themselves, as in the following letter of the Cunard line:

> "Evidence is mounting to confirm our belief that the higher rate of commission paid by the Air Lines on trans-Atlantic bookings is strongly influencing Agents towards increasing their business for Air Services, and we feel that the Steamship Lines can only continue to regard this fact to their detriment. * * * " (App. 279a)

See also minutes of APC action kept by United States Lines, reporting Cunard's belief that respondents were being "seriously handicapped" by their inability to meet the airlines' 10% tour commission (App. 374a-2).

Since the Commission was evaluating the effects of a procedural rule of respondents, admissions of how the same

respondents had abused an identical voting rule in the TAPC was also relevant:

> "In the opinion of the retiring Chairman the one or two negative votes, resulting in pending applications being declined under the above quoted 'unanimous agreement' clause, is extremely detrimental to the best interests of the majority lines. Further that such negative votes may be cast 'on direct instructions' from principals or are actually mischievous rather than cooperative in intent. It is also obvious that the Committee's negative action in these cases is being used to advantage to the fullest possible extent by Trans-Atlantic Air services." (Report of TAPC Committee, App. 241-42a)

The record shows that both agents and the TAPC understood the tieing rule to be, and have treated it as, an *outright prohibition* against selling passage on non-conference vessels (App. 46a, 144-45a, 227a, 271a, 391a, 393a, 395a). From time to time, the TAPC has sent warnings to travel agencies for infractions of the tieing rule (App. 396-97a—stipulated at App. 65a to be typical of warnings given by the lines for infraction of the rule).

The TAPC lines concede that they control 99% of the transatlantic passenger steamship service (App. 13a). There are nevertheless non-conference freighters which provide some passenger service (App. 15a). These lines must also rely on agents for the sale of ocean transportation (App. 13a-14a).

Respondents' witness, American Export Lines' Vice President McConnell, testified that agents have a duty to the public to book passengers on non-conference vessels:

> "* * * the agent has a duty to the public, to the traveling public, to book the passenger by the means which he prefers * * *." (App. 73a)

Yet this is precisely what the tieing rule precludes in the case of a traveler who prefers to cross the Atlantic by freighter rather than by means of respondents' passenger vessels. The tieing rule thus prevents agents from being able to perform their "duty to the public" since they must refuse to book such travelers by means which they may prefer.

On the basis of this evidence the Commission properly found detriment to the commerce of the agents, the non-conference carriers and the public.

The Commission's findings were supported by substantial evidence, much of which came from respondents' own witnesses and files. In addition, it was entitled to draw reasonable inferences from the facts in the record. *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 48-49 (1954). The Commission was also entitled to draw adverse inferences against respondents because of their deliberate efforts to obstruct governmental review, discussed at pp. 10, 13, *supra*. *Compare, Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265 (1946) (a "wrongdoer may not object to * * * [the adequacy of proof] because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable"); *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226 (1939); *United States* v. *Von Clemm*, 136 F. 2d 968, 970 (2d Cir. 1943).

The Commission had to make findings as to how these internal conference rules functioned. It necessarily had to rely upon evidence obtained from respondents them-

selves who have consistently resisted governmental supervision. It is possible that the court below, acting without the intimate knowledge of the industry possessed by the Commission, would have reached a different conclusion from the evidence in the record. But as shown above, there was substantial evidence to support the findings of the Commission, and this should have been dispositive of the matter as far as the court below was concerned.

III.

The court below erred in failing to affirm the correct decision of the Commission on an independent ground it was competent to formulate.

The Commission's disapproval of the unanimity rule should have been affirmed by the court below, since it was correct on independent grounds the court was competent to formulate. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 88 (1943); *Helvering* v. *Gowran,* 302 U. S. 238, 245 (1937); *Chae-Sik Lee* v. *Kennedy,* 294 F. 2d 231, 234 (D. C. Cir.), *cert. denied,* 368 U. S. 926 (1961).

There is undisputed evidence in the record of relationships between respondents and their principal competitors, the international airlines, the existence of which renders the unanimity rule inherently illegal. The voting principals of three of the conference lines (Holland-America, Cunard, Swedish American) are also directors of international airlines (KLM, BOAC, SAS, respectively) engaged in transatlantic passenger service in competition with respondents (App. 128-29a), and there is, and has been, common ownership between one or more of these pairs of carriers. Each

of these major airline competitors, by virtue of the unanimity rule, has the power through its relationship with a respondent to cause, or at least influence, the casting of a veto over APC action on agents' commissions.

"Cooperation" between these purported competitors can be effectuated without discussions, agreements or other indicia of concerted action through a veto vote by a respondent whose greater economic interest may lie in preventing increased competition with the airlines for agents' services. If, for example, any of the voting principals decides that the airline with which he is affiliated wants no change in the maximum ceiling on agents' steamship commissions, there can be no change. The unanimity rule provides the machinery which permits an invisible agreement between a single line and a competitor airline to bind all of the APC lines and, without any overt acts normally associated with conspiracy, prevent respondents from taking action which might increase their ability to compete with the airlines.

The antitrust policy forbidding interlocking directorates in domestic corporations requires no explicit agreement between the supposedly competitive businesses. Clayton Act § 8, 15 U. S. C. § 19.[38] Rather, it realistically recognizes that the danger inherent in this relationship is one that is tacit and subtle; the *potential threat* to competition, due to conflicting interests, is so intense that the status itself is outlawed, irrespective of any overt conspiracy in restraint of trade. *See United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S. D. N. Y. 1953) ("* * * The continued

[38] This legislation is, of course, aimed at restraints between two competitors which are far less serious than the restraints which could result from the potential cartel betwen the air and sea conferences.

potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. * * * ") (Emphasis added.)

Section 15 of the Shipping Act gives the Commission power to approve only agreements among carriers by water. No matter what findings it made, the Commission could not exempt from the antitrust laws an agreement between air and sea carriers. As a matter of law, an interlocking directorate coupled with a voting rule that would give a Janus-like principal the potential to stymie majority aspirations in his own economic interests is beyond the jurisdiction of the Commission. *See United States* v. *Far East Conference,* 94 F. Supp. 900-03 (D. N. J. 1951), *rev'd on other grounds,* 342 U. S. 570 (1952).

Although the record does not establish that unlawful concert of action has occurred between the sea and air carriers, there is evidence of a proclivity for such cooperation. In 1950, for example, the APC subcommittee recommended writing to the international airlines to explain a proposed change in commissions to make them numerically equal to the airlines, as follows:

> " * * * The fact that up to the present the scales of commission paid by the Steamship Lines and the Air Lines have differed has been one obstacle to *cooperation and equalization of certain conditions to our mutual benefit.* It is, therefore, hoped that the step now taken by the Steamship Lines may render possible further consideration of other *problems of mutual interest which have previously been the subject of discussion.*" (App. 626a) (Emphasis added.)

No evidence is available as to the nature of the "problems of mutual interest" previously discussed by the steamship and air lines. Nevertheless, this exhibit demonstrates (a) that such discussions had occurred, (b) that respondents were very much aware of the importance of "cooperation" with their airline competitors and of the desirability of "equalization of certain conditions", (c) that respondents were proposing to adopt the same commission ceiling as the airlines and (d) that respondents believed it important to communicate this fact privately to their competitors. See also views expressed by the French and the Swedish American lines at the March 1, 1956 APC meeting "that more can be done by cooperating with the airlines [on fares] than by standing aloof" (App. 619a); and "Confidential Report" of a cable from IATA privately informing the APC of the airlines' decision in 1957 to refer the question of agents' commissions to an IATA committee for study (App. 630a).

The Commission did not have to reach the issue of inherent illegality posed by the unanimity rule's ability to effectuate concerted action between air and ocean conferences since it had already disapproved the rule for other reasons. However, the court below should have affirmed on this ground, since as this Court said in *Chenery*: "It would be wasteful to send a case back to a lower court [or agency] to reinstate a decision * * * which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate" (318 U. S. at 88). The issue was fully briefed to the court below, and it should have affirmed the Commission's decision on this ground.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed. Because this matter has been pending for almost ten years, it is respectfully submitted that no remand should be ordered, but rather the order of the Federal Maritime Commission should be reinstated and affirmed.

Respectfully submitted,

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December 1, 1967

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	nificance that the principals have at times taken positions opposed to those of the subcommittee, for these have been in the nature of a watering down of actions favored by at least a majority of the lines."		ever instituted any action regarding agents' commission levels without the concurrence of at least a majority of the subcommittee."
17 (SJA 25a)	"Respondents' contention that 'the record fails to show a single example of the unanimity rule frustrating a desire of a majority of the lines as authoritatively expressed by the principals,' is not accurate. The principals' meeting of May 3, 1960, shows such an instance."		
17 (SJA 26a)	"Determining the effect of the unanimity rule upon actions of the principals, as we pointed out, has been rendered difficult because of the conference's failure to keep complete minutes of its meetings and to file them with us. Votes of the principals	4 (JA 456a)	"APC does not take or record votes, and only a bobtailed report of final action taken is filed with the Commission. . . . In general there appears to be a deliberate conference policy to avoid government review of conference action."

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	were neither taken, recorded, nor filed with the Commission, although the approved agreement of the conference required it to furnish the Commission with full records of its activities."		
18 (SJA 26a)	"The unanimity rule blocked attempts by a majority of the lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years."	13 (JA 467a)	[See quotation from page 13 of original report, *supra* p. 31].
20 (SJA 29a)	"The unanimity rule has resulted in maximum level of commissions which places the booking of steamship travel at a competitive disadvantage with airline travel."	21 (JA 478a)	"It [the unanimity rule] . . . has defeated, or at least delayed or watered down the desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage *vis-a-vis* the airlines."
20 (SJA 29a)	"There are two economic factors appearing in the record: (1) the speed and seating capacity of the new	24 (JA 481a)	"But it is undisputed that the enormous growth in air travel is largely attributable to factors unrelated to

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	jet aircraft which result in reduced travel time and added convenience, extensive advertising by airlines and certain other factors inherent in air travel and (2) the additional time which must be spent by the travel agent to book sea passage—the record shows that it takes three to four times as long to book sea passage as it does to book air passage. The former is admittedly not the fault of the unanimity rule, but the latter is an 'economic factor' which the substantial evidence of record indicates that but for the unanimity rule could have been overcome by respondents themselves."		the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States.
		14 (JA 469a)	"It takes approximately three or four times as much of an agent's time to sell sea as compared with air space . . ."
20–21 (SJA 30a)	"The purely superficial equilibrium between commissions for booking air and sea passage (both now stand 7 percent for point-to-point bookings and 10 percent for tours) would, the	19 (JA 475a–476a)	[The Examiner found that there was no showing that a different voting rule would have resulted in increased commissions. The Commission disagreed:] "The record in this pro-

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	record indicates, have been replaced by the majority of conference lines by a higher 'percentage level' of commissions for sea passage which, at the very least, would have reduced the disparity in the respective 'effective levels' of commissions."
22 (SJA 32a)	"The impact of the unanimity rule is clear from the record which shows that since the seven percent commission level finally adopted in 1956 no further increases were made, at least as of 1963, the last year of record here, and that the level of commissions in that year was lower than that actively sought by the majority of the lines 13 years earlier."

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	ceeding compels us to overrule the Examiner on these findings and conclusions. The record shows many instances in which the existence of the Unanimity Rule has blocked or at least delayed the fruition of a desire on the part of a majority of the lines to increase the levels of agents' commissions."
13 (JA 467a)	[See quotation from page 13 of original report, *supra* p. 31].

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23 (SJA 32a–33a)	"Moreover, from the substantial evidence of record it is reasonable to conclude that but for the unanimity rule the majority of the member lines of ASPC would have increased agent's commissions . . ."	21 (JA 477a)	"Perhaps for economic reasons it is not feasible for the lines to raise commission levels at the present time. Nevertheless they should at least be allowed to increase commissions unhampered by the veto power inherent in the Unanimity Rule should they desire to do so."
24 (SJA 34a)	"In 1960, not an unusual year, approximately 80 percent of all Trans-Atlantic passenger steamship bookings made in this country, other than on cruises, were sold by appointed agents."	4 (JA 456a)	"In 1960, the 4000 or so travel agents were responsible for 80 percent of all trans-Atlantic steamship passenger bookings made in the United States, exclusive of tours."

Certificate of Service

I, CARL S. ROWE, a member of the bar of this Court, and an attorney for respondents herein, certify that on the 16th day of August 1967, I served copies of the foregoing "BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA" on the petitioners herein by depositing copies of the same in a United States mail box with first class postage prepaid, addressed to Thurgood Marshall, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, counsel of record for petitioners United States of America and the Federal Maritime Commission; to James L. Pimper, General Counsel, Federal Maritime Commission, Washington, D. C. 20573; and to Robert J. Sisk, Esq., Hughes, Hubbard, Blair & Reed, One Wall Street, New York, New York 10005, counsel of record for petitioner American Society of Travel Agents Inc.

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CARL S. ROWE

August 16, 1967